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Supreme Court Of The United States

OCTOBER TERM, 1980

JAMES BUD LOHMAN,

Petitioner,

VS.

STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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IN THE

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PETITION

The Petitioner, James Bud Lohman, petitions this Court for a Writ of Certiorari to review the opinion, decision and final order of the Oklahoma Court of Criminal Appeals entered November 20, 1980, (Petition for Rehearing denied, December 30, 1980), and corrected on January 13, 1981, affirming the Sequoyah County District Court Judgment of Conviction for the offense of knowingly receiving stolen property entered July 2, 1979, and submits this Petition and brief to show that the United States Supreme Court should accept this case because a substantial Federal question is involved.

QUESTIONS PRESENTED

1. Was the evidence sufficient in this case to justify the jury (rational trier of fact) in finding Petitioner guilty of this offense beyond a reasonable doubt and does this Court have a duty on Petition for Writ of Certiorari to

examine the evidence, as District Courts are required to do in Habeas Corpus actions, to determine if there is such evidence in order to satisfy due process of law as mandated by the Fourteenth Amendment to the United States Constitution?

2. Did the Oklahoma Court of Criminal Appeals deny Petitioner due process of law when it affirmed the judgment of the Sequoyah County District Court in accordance with the verdict of the jury on evidence which was not sufficient in the case to justify the jury (rational trier of fact) in finding Petitioner guilty of this offense beyond a reasonable doubt, when there was a lack of or insufficient corroborating evidence of two accomplices' testimony?

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OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is not reported at this time. The opinion is set forth in Appendix "A" to this Petition.

JURISDICTION

The final order of the Oklahoma Court of Criminal Appeals entered November 20, 1980, (Petition for Rehearing denied, December 30, 1980), and corrected on January 13, 1981, affirming the judgment of the Sequoyah County District Court sentencing Petitioner to one year in the County Jail and assessing a fine of $500.00 on the offense of knowingly receiving stolen property. Notice of filing for Writ of Certiorari to review was filed in the Oklahoma Court of Criminal Appeals on January 2, 1981. A motion to recall the mandate of the Oklahoma Court of Criminal Appeals and to remain on bond was filed in the Oklahoma Court of Criminal Appeals on January 27, 1981. On January 27, 1981, the Oklahoma Court of Criminal Appeals entered an order granting Petitioner's motion to recall the mandate and to remain on bond.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C. Section 1257.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The United States Constitutional Provision involved is Amendment 14 and can be found in U.S.C.A., Constitution, Amendment 14, page 223.

Amendment 14 provides as follows:

> * * * No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On November 14, 1978, Petitioner was charged by information with the offense of knowingly receiving stolen property in violation of 21 O. S. 1971, Section 1713, in that he, on November 13, 1978, unlawfully, willfully, knowingly and feloniously received from parties unknown 18 head of cattle that had been stolen from Dale Sadler and that he knew the property was stolen when he received it with intent to deprive the owner thereof.

The Petitioner was arrested, arraigned, and a preliminary hearing was held on January 10, 1979. At the conclusion of the hearing the Petitioner verbally demurred to the evidence and moved that the Court quash and set aside the information. This motion was overruled. (Preliminary hearing record 64)

Petitioner's trial was set for June 8, 1979. Prior to the trial, Petitioner filed a demurrer and a motion to quash and set aside the information. The trial court overruled the motion and the case proceeded to trial. Counsel for the State of Oklahoma made his opening statement about what he intended to prove and how he intended to prove it. At the conclusion of the statement, the Petitioner demurred to the remarks and moved for a dismissal on the grounds that the State could not prove the Petitioner's guilt beyond a reasonable doubt as a matter of law. The motion was overruled. (Trial record 13)

The State's evidence consisted of the testimony of Dale Sadler (owner of the cattle), various law enforcement officials, accomplices Jess Brown and Jack Cagle. This evidence presented by the State centered primarily around the testimony of Jess Brown, who testified that the Petition-

er engaged him to steal some cattle from a Sebastian County, Arkansas, farm. Brown related the details of the agreement, testifying that the Petitioner offered him $100.00 per head for each cow he delivered.

Brown then recited the events of Sunday, November 12, 1978, when he, Jack Cagle, and several other accomplices made the theft. He attested to making two trips to the Sebastian County farm and returning with the cattle and unloading them in the Petitioner's cattle lot near Vian, Oklahoma. Upon his return with the second load, he and the Petitioner each pulled a trailer load of the stolen cattle to a small pasture in Cherokee County, Oklahoma, near the community of Welling. There, he stated, the stolen cattle were unloaded at Petitioner's direction, and Brown was paid $300.00 by the Petitioner, with the agreement that the remaining $1,500.00 would be paid later for the 18 stolen cows.

Brown's testimony revealed that after leaving the pasture, where the cattle had been taken, he and Jack Cagle drove to Sallisaw, Oklahoma to recover his truck, which had broken down while returning with the first load of stolen cattle. While there, he and Cagle were arrested on other charges.

Other testimony presented by the State revealed that while in jail Brown informed the sheriff of the cattle theft, and later Cagle led officers to the site where the stolen cattle had been taken. One officer testified that the lot where the cattle were recovered was near the Petitioner's home and previously had been leased by the Petitioner. Testimony was presented that while the officers were waiting for the owner of the stolen cattle to arrive for identification of the cattle the Petitioner drove up in his pickup

truck and asked them what they were doing. The Petitioner's explanation for his presence at the lot was that he was looking for some horses which had wandered from his property.

The local sheriff testified that the Petitioner owned a cattle lot near Vian, Oklahoma. Another officer, in his testimony, stated that he saw feed in the back of the Petitioner's pickup truck at the lot where the stolen cattle were recovered. At the end of the State's case in chief, the Petitioner interposed a demurrer to the evidence and moved for a directed verdict which was overruled. (Trial record 151-153)

The Petitioner called Dave Smith and Bob Ray to testify and testified himself. Dave Smith, one of the persons whom Jess Brown said helped steal the cattle, testified that he was presently in Federal custody in Muskogee; he did not know Petitioner; he was in a hospital in Fort Smith, Arkansas, due to arthritis, at approximately the time the cattle were stolen, and he did not steal the cattle. He stated that he had past felony convictions and had previously met Jess Brown at the Federal Corrections Institute in El Reno.

Bob Ray testified that he was a deputy sheriff of Cherokee County and knew the area where the cattle were recovered in Cherokee County; Petitioner had in the past leased land in that area, but had given it up three years ago; Petitioner lived approximately one and one-half miles from where the cattle were found and recovered; and the Petitioner's horses were frequently loose and in that area.

The Petitioner, Bud Lohman, testified that he did not know Jess Brown; he was in the area where the cattle were

recovered hunting his horses; he was home with his wife on Sunday, the 13th day of November, 1978, and in Little Rock, Arkansas on Monday the 14th day of November, 1978, at a pig sale. Certain exhibits (sales slips, etc.) were introduced to prove his whereabouts on the 14th day of November, 1978. He further testified he received a call telling him that Sequoyah County had a warrant for him and he came to the sheriff's office in Sallisaw and was charged.

The Petitioner rested his case and the jury was instructed. The Court instructed the jury, among other things, that the witnesses Brown and Cagle were accomplices and that their testimony had to be corroborated in order for a conviction to be had. It then defined the type of evidence that could corroborate their testimony. After lengthy deliberations, the jury returned a verdict of guilty and assessed Petitioner's punishment at one year in the County Jail and a fine of Five Hundred Dollars.

Subsequent to the jury verdict, the Petitioner filed a motion for a new trial. Before sentencing he presented the motion to the trial court. (Trial record 255-263) He argued that there was insufficient evidence to support the verdict of the jury, moved for a directed verdict of acquittal, requested that the jury verdict be set aside and he be given a new trial. The motions were overruled and the Petitioner was sentenced in accordance with the verdict of the jury on July 2, 1979. (Trial record 263-265)

Petitioner appealed the judgment to the Oklahoma Court of Criminal Appeals. He basically questioned the sufficiency of the evidence to support the verdict of the jury and the failure of the trial court to direct a verdict of acquittal. On November 20, 1980, the Oklahoma Court

delivered its opinion and decision affirming the judgment of the Sequoyah County District Court.

On December 2, 1980, Petitioner petitioned the Oklahoma Court of Criminal Appeals for a rehearing. On December 30, 1980, the Court entered an order denying the rehearing. The Petitioner also filed a motion to clarify the Oklahoma Court's opinion. On January 13, 1981, the Oklahome Court of Criminal Appeals entered an order correcting its opinion in this case.

Petitioner now petitions this Court for a Writ of Certiorari to review the final order and judgment of the Oklahoma Court of Criminal Appeals.

ARGUMENT

Petitioner believes that the questions presented are substantial and require plenary consideration and warrant briefs on the merits and oral argument for resolution of the questions. The two questions are closely related, will be argued together, and the reasons that the questions are substantial is set out below.

There was a total lack of corroborating evidence of the testimony of the two accomplices in this case. Therefore, there was insufficient evidence to support the jury verdict which found the petitioner guilty of this offense beyond a reasonable doubt. When there is insufficient evidence to prove an accused guilty of an offense beyond a reasonable doubt to a rational trier of fact, it is a violation of an accused's Fourteenth Amendment due process rights to permit the conviction to stand.

In Habeas Corpus cases the Federal District Courts are charged with the duty to examine the record to see if the evidence was sufficient to prove a petitioner guilty of the offense beyond a reasonable doubt to a criminal trier of fact. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), citing *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The *Jackson* case should be expanded to include cases that are brought to this Court by certiorari or by direct appeal from a state's highest court. This Court should examine on certiorari the evidence presented in this State Court conviction and reach a decision in this case on the basis of whether the evidence was sufficient to justify a rational trier of fact (jury herein) in finding guilt beyond a reasonable doubt.

This evidence needs to be examined by this Court with the applicable law on the effect of accomplice testimony and the necessary corroboration in mind.

In Federal Courts, a conviction may be had on the uncorroborated testimony of an accomplice if the testimony is believed by a jury. *United States v. Gunter,* 546 F.2d 861 (10th Cir. 1976); *United States v. Esters,* 181 F. Supp. 203 (D.C. Ark. 1958).

At common law, it is well settled that the testimony of an accomplice, although entirely without corroboration will support a verdict of guilty of one accused of crime. *Caminetti v. United States,* 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442. This rule has been changed in several states, generally by statute. 30 AM. JUR. 2d, *Evidence,* Section 1151, page 328. See the following sections in the treatise for a general discussion of the law on corroboration.

In Oklahoma, in accordance with 22 O.S. 1971 Section 742, a conviction cannot be had upon the uncorroborated testimony of an accomplice. *Flynn v. State,* 10 Okl. Cr. 41, 133 P. 1133 (1913); *Trotter v. State,* 573 P.2d 1219 (1978). Once the evidence shows the witness to be an accomplice his testimony does not merit belief unless it is independently substantiated. *Nunley v. State,* 601 P.2d 459 (Okl. Cr. 1979). The purpose of the statutory requirement is to protect the accused so that an accomplice cannot make a deal and testify falsely. *Comba v. State,* 68 Okl. Cr. 373, 99 P.2d 170 (1940).

Arkansas has an identical statute. *Ark. Stat. Ann.* Section 43-2116. Therefore, under Arkansas law, an accomplice's testimony must be corroborated. *Atwell v. State of Arkansas,* 426 F.2d 912 (10th Cir. 1970); *Moore v. State,* 251 Ark. 436, 472 SW2d 940 (1971).

In Oklahoma there cannot be a conviction unless there is proof of substantial facts tending to connect the defendant with the commission of the offense, aside from, and without the aid of the accomplices' testimony. *Rogers v. State,* 57 Okl. Cr. 294, 48 P.2d 344 (1935); *Fitzgerald v. State,* 85 Okl. Cr. 376, 188 P.2d 396 (1948). And, slight evidence which only tends to raise a mere suspicion is not sufficient. *Howard v. State,* 561 P.2d 125 (Okl. Cr. 1977). It must tend to connect the defendant with the offense and not to the perpretrators. *Davis v. State,* 542 P.2d 532, vacated 428 U.S. 907, 96 S.Ct. 3217, 49 L.Ed.2d 1215, on remand 554 P.2d 815. Of course, it can be by circumstantial evidence. *Wampler v. State,* 553 P.2d 198 (1976). The evidence is not sufficient if all the evidence that is present is the testimony of the accomplice. *Haggerty v. State,* 19 Okl. Cr. 386, 200 Pac. 553 (1921); *Powell v. State,* 21 Okl. Cr. 332, 207 Pac. 570 (1922).

The case law in Arkansas and other states is identical to that of Oklahoma. A test on the sufficiency of corroborating testimony of an accomplice is, if his testimony were eliminated from the case, would the other testimony establish the commission of the offense and the connection of the accused therewith. *Pace v. State,* 267 Ark. 610, 592 SW 2d 21 (1980); *Oiles v. State,* 260 Ark. 571, 542 SW2d 755 (1976). The corroborating evidence must tend to connect the accused with the offense and it is insufficient if it only raises a suspicion of guilt. *Pollard v. State,* 264 Ark. 753, 574 SW2d 656 (1978). And the suspicion, even though founded on moral belief does not mreit the test. *Bright v. State,* 212 Ark. 852, 208 SW2d 168 (1948). Corroborating evidence that is as consistent with accused's innocence as guilt is not sufficient. *Green v. State,* 265 Ark. 179, 577 SW2d 596 (1979); *Underwood v. State,* 205 Ark. 864, 171 SW2d 304

(1943); *Thompson v. State,* 207 Ark. 680, 182 SW2d 386 (1944).

In Oklahoma, in the first instance, if there is none or insufficient corroboration (which is a question for the Court on a motion for directed verdict), the accused is entitled to a directed verdict of acquittal. *Kirby v. State,* 505 P.2d 504 (Okl. Cr. 1973). If the Court holds the corroborating evidence is sufficient for the issue to go to the jury, the question of the sufficiency of the evidence for guilt beyond a reasonable doubt is for the jury. *Scott v. State,* 72 Okl. Crim. 305, 115 P.2d 763 (1941). That is also the rule in Arkansas. *Powell v. State,* 177 Ark. 938, 9 SW2d 583 (1928); *Beasley v. State,* 219 Ark. 452, 242 SW2d 961 (1951); *Celender v. State,* 86 Ark. 23, 109 SW 1024 (1908). In other words, the weight of the corroborating evidence is for the jury. *Ford v. State,* 205 Ark. 706, 170 SW2d 671 (1943). And, the corroborating evidence of the accomplice must be substantial in order to sustain a conviction. *Strum v. State,* 168 Ark. 1012, 272 SW 359 (1925).

Some other cases in Oklahoma that are very similar to this case where the Court held the corroborating evidence insufficient are *Logan v. State,* 23 Okl. Cr. 316, 214 Pac. 944 (1973), and *Key v. State,* 38 Okl. Cr. 169, 259 Pac. 659 (1927). Also, in Arkansas there are some similar cases. *Dunn v. State,* 256 Ark. 508, 508 SW2d 555 (1974); *Cockrell v. State,* 256 Ark. 19, 505 SW2d 204 (1974). Ownership of a vehicle used in a larceny was not enough corroboration. *Pitts v. State,* 247 Ark. 434, 446 SW2d 222 (1969). Placing the defendant near the scene of a crime is not enough corroboration. *Farrar v. State,* 241 Ark. 259, 407 SW2d 112 (1966).

With this general law of corroboration and particular and similar cases in mind, petitioner will turn the discussion to the law and facts of the case at bar.

Petitioner submits that a careful reading of the trial record will reveal that no evidence outside of the testimony of the accomplices was presented which tended to connect the Petitioner with the criminal offense of Knowingly Receiving Stolen Property in Sequoyah County, Oklahoma or any other county in Oklahoma. In *Vanwick v. State,* 287 Pac. 1083 (Okl. Cr. 1934), the Oklahoma Court set out the elements that needed to be proved in order to sustain a conviction for this offense. It said:

> "To sustain a conviction for receiving stolen goods, state must prove beyond reasonable doubt that property was stolen; that it was received by defendant from someone other than the owner; *that receiving thereof was within the County in which prosecution was instituted*; and that defendant knew or had reason to believe, and did believe, that property was stolen." (Emphasis added)

True, Petitioner owned a lot near Vian, Oklahoma (Sequoyah County) where the accomplices said the stolen cattle were first taken. However, there is no evidence outside of, or when the accomplices' testimony is eliminated, which shows that the cattle were ever at the lot owned by Petitioner. The ownership of a lot in Sequoyah County, Oklahoma, is consistent with innocent not guilt. Did any other evidence put the cattle at Petitioner's lot except that of the accomplices? The obvious answer to that question is a resounding *NO.*

What so-called corroborating evidence is present? The

Oklahoma Court said there was some. It lists, (1) Petitioner owned a lot near Vian, Oklahoma; (2) the cattle were found in a lot near Petitioner's home in Cherokee County, Oklahoma; (3) it was a lot he had previously used (he had leased it three years before this event); and (4) Petitioner drove up to the lot where the cattle were found in his pickup with hay and feed in the back. How do these acts corroborate the accomplices' testimony? They do not. These acts are more consistent with innocence than guilt. They do not tend to connect him with the crime. It is innocent to own a cattle lot; it is innocent to live near where stolen cattle are found; it is innocent to have previously leased or used a lot where stolen cattle are found; it is innocent to drive up near a lot where stolen cattle are found with hay and feed in your pickup (perhaps, if the authorities had seen him feeding the cattle it would not have been innocent, but they did not). It is especially innocent when the testimony reflects that you are a farmer, have cattle and horses in the area, and your horses sometimes get out and you have to look for them. Being near the scene is not enough. *Farrar v. State,* supra. Ownership or previous ownership is not enough. *Pitts v. State,* supra.

There was not sufficient corroborating evidence for the trial court to permit this case to go to the jury. A directed verdict should have been entered. Further, even if there was enough corroboration to submit the case to the jury (which there was not) there was not enough evidence present to convince a rational trier of fact of the Petitioner's guilt beyond a reasonable doubt. Here, a rational trier of fact could not have found enough corroboration to satisfy it beyond a reasonable doubt of guilt. The finding of guilt is based on suspicion, speculation and conjecture. The

Petitioner was never observed doing anything criminal if the testimony of the accomplices is eliminated. No evidence tends to connect him with the offense. The acts of the Petitioner were as consistent with innocence (or more so) as guilt. The finding of guilt of Petitioner beyond a reasonable doubt in this case, in light of this lack of corroboration, violates Petitioner's right to due process of law.

As was stated before, under the authority of *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 560 (1979), this Court should examine on certiorari the evidence presented in this State Court conviction and reach a decision in this case on whether the evidence was sufficient to justify a rational trier of fact (jury herein) in finding guilt beyond a reasonable doubt.

For the above reasons this Court, as Federal District Courts are required to do in Habeas cases concerning State convictions, should accept this case and determine if there is sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. Petitioner submits that it is not sufficient and he has been denied his constitutional right to due process of law and a fair trial.

Because the evidence in this case is lacking or is so slight, it is important that this case be accepted for decision because an important Federal question of violation of due process rights of a petitioner in this type of situation (corroboration of accomplice testimony) is present and urgently calls for resolution.

CONCLUSION

Petitioner submits that for the above reasons the Petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

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Appendix

APPENDIX "A"

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JAMES BUD LOHMAN

vs.

STATE OF OKLAHOMA

NO. F-79-710

Opinion delivered November 20, 1980

BUSSEY, Judge:

The appellant, James Bud Lohman, was tried and convicted on a charge of Knowingly Receiving Stolen Property, in the District Court of Sequoyah County, Case No. CRF-78-260. The jury returned a verdict of guilty and assessed a sentence of one (1) year in the County jail and a fine of Five Hundred Dollars ($500.00).

The evidence presented by the State centered primarily around the testimony of Jess Brown, who testified that the appellant engaged him to steal some cattle from a Sebastian County, Arkansas, farm. Brown related the details of the agreement, testifying that the appellant offered him $100.00 per head for each cow he delivered.

Brown then recited the events of Sunday, November 12, 1978, when he, Jack Cagle, and several other accomplices

made the theft. He attested to making two trips to the Sebastian County farm and returning with the cattle and unloading them in the appellant's cattle lot near Vian, Oklahoma. Upon his return with the second load, he and the appellant each pulled a trailer load of the stolen cattle to a small pasture in Cherokee County, Oklahoma, near the community of Welling. There, he stated, the stolen cattle were unloaded at appellant's direction, and Brown was paid $300.00 by the appellant, with the agreement that the remaining $1,500.00 would be paid later for the 18 stolen cows.

Brown's testimony revealed that after leaving the pasture, where the cattle had been taken, he and Jack Cagle drove to Sallisaw, Oklahoma, to recover his truck, which had broken down while returning with the first load of stolen cattle. While there, he and Cagle were arrested on other charges.

Other testimony presented by the State revealed that while in jail Brown informed the sheriff of the cattle theft, and later Cagle led officers to the site where the stolen cattle had been taken. One officer testified that the lot where the cattle were recovered was near the appellant's home and previously had been leased by the appellant. Testimony was presented that while the officers were waiting for the owner of the stolen cattle to arrive for identification of the cattle the appellant drove up in his pickup truck and asked them what they were doing. The appellant's explanation for his presence at the lot was that he was looking for some horses which had wandered from his property.

The local sheriff testified that the appellant owned a cattle lot near Vian, Oklahoma. Another officer, in his testimony, stated that he saw feed in the back of the appellant's pickup truck at the lot where the stolen cattle were

recovered. At the end of the State's case in chief, the appellant interposed a demurrer to the evidence which was overruled.

The appellant testified in his own behalf that he was home with his wife the night of the theft and in Little Rock, Arkansas, on the subsequent day.

The appellant's two assignments of error assert essentially the same argument: that the evidence was insufficient to submit to the jury on the charge of receiving stolen property. He bases his argument on two points of law. The first is that a conviction cannot be had upon the uncorroborated testimony of an accomplice.

Defendant reasons that the testimony of Brown indicated that the theft and later receiving were pursuant to a prearranged plan, thereby taking this case out of the general rule that the thief is not an accomplice of the receiver, and requiring corroboration under 22 O.S. 1971, §742. See *Hair v. State,* Okl. Cr. 294 P.2d 846 (1956) and 53 ALR2d 817 §§11 and 12. However, this view has been criticized, see *State v. Mercer,* 114 Mont. 142, 133 P.2d 358 (1943) and 2 UCLA Law Review 571 (case note), and seems to rest on a more theoretical, than actual, basis. However, we need not review the continued vitality of this view, since even assuming that Brown was an accomplice, sufficient corroboration appears in the record.

The evidence brought forth by the State in corroboration of the accomplice's testimony revealed that the lot near Vian, Oklahoma, to which the cattle were first taken, was owned by the appellant, that the cattle were found in a lot near the appellant's home and one which he previously had used, and that the appellant drove up to the lot in his pickup

with hay and feed in the back while the officers were waiting for the owner of the stolen cattle. This evidence sufficiently corroborates the testimony of the accomplice to allow the jury to infer that he was testifying truthfully.

The second point of law brought forth by the appellant to support the argument that his demurrer should have been sustained is that his agreement with Brown made him a principal in the theft of the cattle, and that therefore he could not have been found guilty of receiving stolen property. As authority for this contention, he relies on the decision in *McGee v. State,* 60 Okl. Cr. 436, 65 P.2d 207 (1937), which he interprets to mean that one who assists in a theft or asportation of stolen property cannot be convicted as a receiver. The appellant misconstrues our holding in *McGee,* however. There, the defendant, accused of receiving stolen property, was shown to have assisted the thieves in transporting stolen tires to a site where they could be sold. We stated that without evidence of relinquishment of the stolen property on the part of the thieves to the defendant he could not be guilty of receiving it. In the present case, the testimony showed clearly that the thieves turned over the cattle to the appellant at his direction. In this case, unlike *McGee,* evidence of the thieves' relinquishment of the stolen property was sufficiently shown.

It has never been held by this Court that where there is a prearranged plan for one to steal property and deliver it to another the one to whom the property was delivered could not be convicted of receiving stolen property. Numerous cases have held to the contrary. See *Sparks v. State,* 94 Okl. Cr. 416, 237 P.2d 159 (1951); *Palmer v. State,* 93 Okl. Cr. 357, 228 P.2d 391 (1951); *Butcher v. State,* 44 Okl. Cr. 124, 279 P. 973 (1929).

In a prosecution for receiving stolen property, all that need be shown is that the property is in fact stolen, that the accused took possession of the stolen property, and that he knew or should have known that the property was stolen. *Gentry v. State,* Okl. Cr. 562 P.2d 1170 (1977). These elements were established by the State. The testimony showing that the appellant and the confessed thieves had a prearranged plan, did not preclude a conviction for receiving stolen property. The trial court did not err in overruling the appellant's demurrer to the evidence.

The judgment and sentence is, accordingly, *AFFIRMED.*

AN APPEAL FROM THE DISTRICT COURT, SEQUOYAH COUNTY, OKLAHOMA

HONORABLE BILL ED ROGERS, *Judge*

JAMES BUD LOMAN, appellant, was convicted of Knowingly Receiving Stolen Property; was assessed a fine of Five Hundred Dollars ($500.00), and appeals. AFFIRMED.

GERALD HUNTER,
Sallisaw, Oklahoma,
Attorney for Appellant,

JAN ERIC CARTWRIGHT,
Attorney General,
Michael Jackson,
Asst. Atty. Gen.,

RICHARD PARRISH,
Legal Intern,
Attorneys for Appellee.

OPINION BY BUSSEY, J.
CORNISH, P.J., CONCURS
BRETT, J., CONCURS

APPENDIX "B"

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES BUD LOHMAN

vs.

STATE OF OKLAHOMA

NO. F-79-710

ORDER DENYING PETITION FOR REHEARING

A petition for rehearing has been filed by the Appellant in the above styled and numbered cause. Upon examination and consideration of the petition and authorities cited therein, and the opinion of this Court in the cause, and being fully advised in the premises, it is the order of this Court that the petition be denied.

IT IS SO ORDERED.

WITNESS OUR HANDS and the seal of this Court this 30th day of December, 1980.

/s/ Hez J. Bussey, Judge
/s/ Tom Brett, Judge

ATTEST:

/s/ Ross N. Lillard, Jr., Clerk

APPENDIX "C"

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JAMES BUD LOHMAN

vs.

STATE OF OKLAHOMA

NO. F-79-710

ORDER CORRECTING OPINION

NOW, on this 13th day of January, 1981, this Court finds that the opinion issued in this cause on the 20th day of November, 1980, should be and is hereby corrected on the last page to reflect the following:

> "JAMES BUD LOHMAN, appellant, was convicted of Knowingly Receiving Stolen Property; was assessed a sentence of one (1) year in the County jail and a fine of Five Hundred Dollars ($500.00), and appeals. AFFIRMED."

IT IS SO ORDERED.

WITNESS OUR HANDS and the Seal of this Court this 13th day of January, 1981.

/s/ Tom Brett, Presiding Judge
/s/ Hez U. Bussey, Judge
/s/ Tom R. Cornish, Judge

ATTEST:

/s/ Ross N. Lillard, Jr., Clerk

APPENDIX "D"

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES BUD LOHMAN

vs.

STATE OF OKLAHOMA

NO. F-79-710

NOTICE FOR FILING FOR WRIT OF CERTIORARI TO REVIEW

COMES NOW the Appellant-Petitioner, James Bud Lohman, and hereby gives notice of filing for Writ of Certiorari to review the final Decision and Opinion delivered on November 20, 1980, by the Court of Criminal Appeals affirming the Judgment of the District Court of Sequoyah County, dated July 2, 1979, and designates the entire Judgment, Opinion and Decision of the Court of Criminal Appeals to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provisions of 28 U.S.C., Section 1257(3).

JAMES BUD LOHMAN

By: /s/ JIM JONES
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P.O. Drawer 588
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Filed on January 27, 1981.